

U.S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION
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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 12-87, CHANGE 1
TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
FROM : DONALD J. KULICK *D. Kulick*
Administrator
for Regional Management
SUBJECT : Revised Interpretation of Section 3304(a)(14) of the Federal Unemployment Tax Act Relating to the Adjustment of Status of Certain Aliens to Lawfully Admitted for Temporary Residence

1. Purpose. To advise State agencies of a revised interpretation of Section 3304(a)(14) of the Federal Unemployment Tax Act (FUTA) relating to the wages for services of aliens which may be used for computing monetary entitlement to unemployment benefits. This revised interpretation permits States to pay benefits based on wages from otherwise covered services performed on or after November 6, 1986, by aliens granted lawful temporary resident status under Section 210(a)(1) or Section 245A(a) of the Immigration and Nationality Act (INA).

2. References. UIPL 1-86; UIPL 12-87; Section 3304(a)(14), FUTA; Section 210 and Section 245A, INA.

3. Background. Section II of Attachment III to UIPL 12-87 transmitted information to the States concerning implementation of Section 245A of the INA. Section 245A(a), INA, authorizes the adjustment of status of certain aliens who entered the United States before January 1, 1982, to that of lawfully admitted for temporary residence. Section 245A(e) provides for the temporary stay of deportation and the granting of work authorization for certain aliens before and during the application period for adjustment of status. Section ~~245A(b)(3)~~ provides for work authorization while the alien is in lawful temporary resident status.

RESCISSIONS	EXPIRATION DATE
	October 31, 1989

DISTRIBUTION

Section IV of Attachment III to UIPL 12-87 transmitted information concerning implementation of Section 210 of the INA. Section 210(a)(1) sets forth the conditions for the adjustment of status of special agricultural workers to that of lawfully admitted for temporary residence. Section 210(d) provides for temporary stay of deportation and the granting of work authorization for certain aliens before and during the application period for adjustment of status. Section 210(a)(4), INA, provides, among other things, that during the period an alien is in lawful temporary resident status under Section 210(a), the alien "shall be granted authorization to engage in employment in the United States and shall be provided an 'employment authorized' endorsement or other appropriate work permit, in the same manner as for aliens lawfully admitted for permanent residence."

For aliens to receive unemployment benefits, they must satisfy two eligibility requirements: non-monetary eligibility during the benefit year, and monetary eligibility during the base period. With respect to the first requirement, when an alien's status is adjusted to lawfully admitted for temporary residence or when the alien is granted work authorization under Section 245A or Section 210 of the INA, the alien becomes legally available for work. Such an alien is eligible for unemployment benefits if the alien is also unemployed, able and available for work, and otherwise satisfies the State's eligibility requirements for receiving benefits.

With respect to the second requirement, monetary eligibility during the base period, the requirements of Section 3304(a)(14), FUTA, apply. The second category under Section 3304(a)(14) specifies that services performed while an alien was "lawfully present for purposes of performing such services" may be used for computing monetary eligibility if the State law includes the second category and the State construes the State law provision as including such aliens. Therefore, benefits based on wages for otherwise covered services performed while an alien is lawfully admitted for temporary residence under Section 245A(a) or Section 210(a)(1), or after the alien is granted work authorization under Section 245A or Section 210, may be paid (if the State law so provides and the alien is otherwise eligible) because the services were performed while the alien was lawfully present for purposes of performing services.

However, Section II.D.2 and Section IV.D.2 of Attachment III to UIPL 12-87 state that the status of lawful temporary resident or the granting of work authorization does not confer retroactive lawful presence for purposes of monetary entitlement. This means that an alien's services may only be used for establishing monetary entitlement from the date INS grants lawful temporary resident status or work authorization. This interpretation is now partially revised as set forth below.

4. Revised Interpretation. Although Section 210 and Section 245A were effective November 6, 1986, INS did not start accepting applications for lawful temporary resident status until May 5, 1987. INS could have accepted applications for, and granted lawful temporary resident status, as early as November 6, 1986, if it had been able to set up its application process by that date. ETA, therefore, has modified its interpretation of Section 3304(a)(14) to permit States, if State law so allows, to pay benefits based on wages from otherwise covered services performed on or after November 6, 1986, by aliens granted lawful temporary resident status under Section 245A(a) or Section 210(a)(1), INA. This is optional for each State and not a requirement for conformity. The retroactive use of an alien's wages to November 6, 1986, is permitted only if the alien is granted lawful temporary resident status. However, to use such retroactive wages in computing monetary entitlement, the alien must present the agency with documentation of the lawful temporary resident status, i.e., temporary resident card (INS Form I-688).

A distinction exists between INS Form I-688, which is issued to an alien granted lawful temporary resident status and includes work authorization, and INS Form I-688A which is the work authorization issued to an applicant for legalization along with the application fee receipt. The work authorization on INS Form I-688A is effective on the date stated on the form itself, and may never be given retroactive effect for any purpose. The retroactive use of an alien's wages for computing monetary entitlement, as discussed above, only occurs in connection with the granting of lawful temporary resident status and the issuance of INS Form I-688.

When an alien is granted lawful temporary resident status under Section 245A(a) or Section 210(a), INA, the alien falls within the second category of Section 3304(a)(14), FUTA -- lawfully present for purposes of performing such services -- and each State, at its option, may treat such status as retroactive as far back as November 6, 1986, for the purpose of computing monetary eligibility. Therefore, if the State law includes the second category, and the State construes the State law provision as including such an alien, then wages paid to the alien for otherwise covered services performed on or after November 6, 1986, or such later date as the State construes its law, may be used to compute monetary eligibility. If a State decides to use such wages in computing monetary eligibility, it must first examine its State law to determine if such retroactive use of an alien's wages is permissible.

5. Action Required. State Administrators are requested to provide this information to appropriate staff.

6. Inquiries. Questions should be directed to the appropriate Regional Office.

7. Attachments. Attachment I of this UIPL should be substituted for the last sentence of the first paragraph of Section II.D.2, page 9, Attachment III to UIPL 12-87, which reads as follows:

The status of temporary residence or granting of work authorization does not, however, confer retroactive lawful presence for purposes of monetary eligibility.

Attachment II of this UIPL should be substituted for the following sentence contained in Section IV.D.2, page 12, Attachment III to UIPL 12-87:

The status of temporary residence or granting of work authorization does not, however, confer retroactive lawful presence for purposes of monetary eligibility under the FUTA.

ATTACHMENT I to UIPL NO. 12-87,
CHANGE 1

Although Section 245A of the INA was effective November 6, 1986, INS will not start accepting applications for lawful temporary resident status until May 5, 1987. INS could have accepted applications for and granted lawful temporary resident status as early as November 6, 1986, if it had been able to set up its application process by that date. ETA, therefore, has modified its interpretation of Section 3304(a)(14) to permit States, at each State's option, and if State law so allows, to pay benefits based on wages from otherwise covered services performed on or after November 6, 1986 (i.e., as far back as that date) by aliens granted lawful temporary resident status under Section 245A(a), INA. This is optional for each State and not a requirement for conformity. For the purpose of conformity, however, the use of an alien's wages for services retroactive to November 6, 1986, is permitted only after the alien is granted lawful temporary resident status. To justify the use of such wages in computing monetary entitlement, the alien must present the agency with documentation of the lawful temporary resident status, i.e., temporary resident card (INS Form I-688).

A distinction exists between INS Form I-688, which is issued to an alien granted lawful temporary resident status and includes work authorization, and INS Form I-688A which is the work authorization issued to an applicant for legalization along with the application fee receipt. The work authorization on INS Form I-688A is effective on the date stated on the form itself, and may never be given retroactive effect for any purpose. The retroactive use of an alien's wages for computing monetary entitlement, as discussed above, occurs only in connection with the granting of lawful temporary resident status and the issuance of INS Form I-688.

ATTACHMENT II to UIPL NO. 12-87,
CHANGE 1

For the same reason given on page 9, item II.D.2 of this Attachment, a State may, if State law so allows, pay benefits based on wages from otherwise covered services performed on or after November 6, 1986, by aliens granted lawful temporary resident status under Section 210(a)(1), INA. This is optional for each State and not a requirement for conformity. For the purpose of conformity, however, the use of an alien's wages for services retroactive as far back as November 6, 1986, is permitted only if the alien is granted lawful temporary resident status. To justify the use of such services in computing monetary entitlement, the alien must present the agency with documentation of the lawful temporary resident status, i.e., temporary resident card (INS Form I-688).

A distinction exists between INS Form I-688, which is issued to an alien granted lawful temporary resident status and includes work authorization, and INS Form I-688A which is the work authorization issued to an applicant for legalization along with the application fee receipt. The work authorization on INS Form I-688A is effective on the date stated on the form itself, and may never be given retroactive effect for any purpose. The retroactive use of an alien's wages for computing monetary entitlement, as discussed above, only occurs in connection with the granting of lawful temporary resident status and the issuance of INS Form I-688.